SUPREME COURT OF THE UNITED STATES

_____ Term, 19 ____

No. _____

71-1442

ROLAND V. COLGROVE,

Petitioner,

against

HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION.

Respondent.

• • • • • • • • • • •

ROLAND V. COLGROVE,

Plaintiff,

-vs-

Civil No. 763

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX
TABLE OF CONTENTS

	Page
The Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statute and Regulations Involved	3
Statement of the Case	4
Reasons for Granting Writ	5
Conclusion	6
Appendix	7
Order and Opinion of the Court Below	7
Certificate of Service	12

CASES CITED

Capital Traction Co. v. Hof, 174 U.S. 1, 43 L.Ed. 873, 19 S.Ct. 580	5
Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969)	6
Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854	5
Williams v. Florida, 399 U.S. 78, 26 L.Ed.(2d) 466, 90 S.Ct. 1893	5

U.S. CONSTITUTION CITED

Sixth Amendment	2,5
Seventh Amendment	3,5,6

INDEX

STATUTES CITED

	Page
28 U.S.C. Section 1254(1)	2
28 U.S.C. Section 1414(b)	4
28 U.S.C. Section 2071	3,6
28 U.S.C. Section 2072	3,6
F.R.Civ.P., Rule 48	2,3,5
F.R.Civ.P., Rule 83	2,3,5
Revised Rules of Procedure of the United States District Court of Montana, Rule 13(d)(1)	4

MISCELLANEOUS

7 Moore's Federal Practice (2d), par. 83.03, pg. 4704	5

SUPREME COURT OF THE UNITED STATES

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ROLAND V. COLGROVE,

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HONORABLE JAMES F. BATTIN,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF MONTANA,
BILLINGS DIVISION,

Respondent.

• • • • • • • • • • •

ROLAND V. COLGROVE,

Plaintiff,

-vs-

Civil No. 783

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 6, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet officially reported. The court below refused to grant petitioner a writ of mandamus to force the United States District Court for the District of Montana to try this case before a jury of twelve persons. A copy of said opinion is found in the Appendix.

JURISDICTION

The order and decision of the United States Court of Appeals was entered on March 6, 1972. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Did the court below err in holding that the Seventh Amendment to the Constitution of the United States does not require that a United States District Court try a civil case before a jury of twelve persons?

(2) Did the court below err in holding that Rule 48 and Rule 83 of the Federal Rules of Civil Procedure do not require the trying of cases before a jury of twelve persons unless the parties stipulate otherwise?

CONSTITUTIONAL PROVISIONS INVOLVED

Admendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, * * *."

Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATUTES AND RULES INVOLVED

28 U.S.C., Section 2071, provides:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

It is stated in 28 U.S.C., Section 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as to common law and as declared by the Seventh Amendment to the Constitution."

Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

"Each district court by action of a majority of the

judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. * * * In all cases not provided for by rules, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 13(d)(1) of the Revised Rules of Procedure of the United States District Court for the District of Montana provides:

"A jury for the trial of civil cases shall consist[of six persons * * *"

STATEMENT OF THE CASE

The suit in the United States District Court for the District of Montana, out of which the petition for writ of mandamus grew, was an action for libel and jurisdiction of the case is invoked under Title 28, U.S.C. 1414(b). There is diversity of citizenship between the parties hereto and the amount in controversy exceeds $10,000.00.

The United States District Court for the District of Montana passed Rule 13(d)(1) of the Revised Rules of Procedure of said court, and the same became effective on September 1, 1971. Pursuant to said Rule 13(d)(1), the United States District Court set the trial of Civil No. 783 for September 27, 1971, to a jury consisting of six persons.

The plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons. The court denied this motion, but rescheduled the trial of the case for October 12, 1971. Thereafter, the court vacated that setting and ordered that the resetting be subject to the direction of the Circuit Court of Appeals.

The petitioner, on or about October 7, 1971, petitioned the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus. Thereafter, and on March 6, 1972, the Circuit Court of Appeals handed down its order and opinion denying the petition for writ of mandamus.

REASONS FOR GRANTING THE WRIT

(1) This Court, in *Williams v. Florida*, 399 U.S. 78, 26 L.Ed. (2d) 466, 90 S.Ct. 1893, while holding that the Seventh Amendment does not guarantee a right to a jury of twelve persons in a criminal case, in Note 30, 399 U.S. 92, said:

> "* * * we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation."

The Sixth Amendment does not use the words "common law." The Seventh Amendment uses the words "common law" twice.

At common law, a jury consisted of twelve persons. *Williams v. Florida*, supra; *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854.

This Court has heretofore ruled that the Seventh Amendment guaranteed a right to a jury of twelve persons. *Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.Ed. 873, 19 S.Ct. 580.

The Court should now grant the writ of certiorari so the parties would not be subject to possible reversal of the case because of not trying the case before a jury of twelve persons.

(2) The U.S. District Court, under Rule 83 of the Federal Rules of Civil Procedure, can make rules not inconsistent with Federal Rules.

The local rules must not be inconsistent with the Federal Rules. 7 Moore's Federal Practice 2d, paragraph 83.03

Rule 48 of the Federal Rules of Civil Procedure gives the parties power to stipulate to a jury of less than twelve persons. It does not give the United States District Court the authority to force upon the parties a jury of less than twelve persons. In *Fox v. United States*, 417 F.(2d) 84,

89 (5th Cir. 1969), the Court held that, in the absence of a stipulation, Rule 48 required a jury of twelve persons.

28 U.S.C. 2071 grants to the Supreme Court and the other courts the power to make rules. 28 U.S.C. 2072 provides for the power of the Supreme Court to make the general rules for all of the courts and to submit them to Congress. It is noteworthy in 28 U.S.C. 2072 that the following words are used:

> "Such rules * * * shall preserve the right of trial by jury as a common law and as declared by the Seventh Amendment to the Constitution."

Congress, at the time of passing this bill, must have known that the accepted rule was that a common law jury consisted of twelve persons.

It appears, therefore, that if a jury of twelve persons is not constitutionally necessary under the Seventh Amendment, that until Congress changes the law the United States District Court cannot force upon the parties a jury of less than twelve persons.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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Helena, Montana 59601

s/ Lloyd J. Skedd

Counsel for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROLAND V. COLGROVE,
Petitioner,

vs.

HON. JAMES F. BATTIN,
United States District Judge
for the District of Montana,
Billings Division,
Respondent.

No. 71-2546

Original Proceedings
Petition for Writ of Mandamus

Before: MERRILL, DUNIWAY and TRASK, Circuit Judges

MERRILL, Circuit Judge

Pursuant to the authority of Rule 83 of the Federal Rules of Civil Procedure,[1] the District Court for the District of Montana promulgated its local Rule of Procedure 13(d)(1), effective September 1, 1971:

> "A jury for the trial of civil cases shall consist of six persons * * *"

In Civil Case No. 783 in the District Court for the District of Montana, petitioner, as plaintiff, sought a jury trial. Respondent District Judge, over the objection of petitioner that he was entitled to a jury of twelve, ordered that trial be to a jury of six persons, pursuant to the new local rule. Petitioner, by these proceedings seeking a writ of mandamus, challenges the validity of that rule. The defendant in Civil Case No. 783 has appeared in these proceedings, aligning itself with the position of petitioner.

The challenge to the District Court rule is primarily on

three levels:

1. It is contended that the rule violates the Seventh Amendment to the Constitution of the United States.[2]

We conclude otherwise.

In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court held that the Sixth Amendment does not guarantee a right to a jury of twelve in criminal cases. While the question of whether this conclusion should apply to civil cases under the Seventh Amendment was reserved by the Court, 399 U.S. at 92 n.30, the reasons given for the holding seem to us to apply with equal force to the Seventh Amendment. That amendment does, it is true, refer to the common law. It does not, however, purport to define the jury or trial by jury in terms of the common law.

2. It is contended that the local rule cannot stand in light of 28 U.S.C. Sec. 2072, the statute which authorized promulgation by the Supreme Court of the Federal Rules of Civil Procedure.[3]

We conclude otherwise.

Here we are confronted with the phrase "right of trial by jury as at common law." This language upon its face would appear to deny to the Supreme Court authority to dispense with any characteristics of the jury or of trial by jury known to the common law. This would indeed be a sweeping limitation. The Congress has, it is true, dealt extensively with the jury system. 28 U.S.C. Sec. 1861, et seq. It is hardly conceivable, however, that it was felt that the Supreme Court should not be allowed initially to move in interstitial areas save in accordance with perhaps archaic common law procedures.[4]

An historical inquiry suggests that the language in question was included in the predecessor statute, Act of June 19, 1934, ch. 651, Sec. 2, 48 Stat. 1064, in anticipation that the forthcoming rules would unite law and equity and to assure

that with such union the right of trial by jury would be neither expanded nor contracted. 5 *Moore's Federal Practice*, par. 938.06 at 44 (2d ed. 1971). *See also* House Rep. No. 1829, 73d Cong., 2d Sess. (1934).

We construe the language in question in accordance with this position. In our view, "as at common law" in this context means "*in those cases in which the right existed* at common law." The parallel inclusion in Sec. 2072 of the phrase "as declared by the Seventh Amendment" serves to assure that the essence of the right to trial by jury itself will be maintained in appropriate cases governed by the federal rules.[5] Each phrase then serves an important but distinct purpose.

3. It is contended that the rule is inconsistent with Rules 38(a)[6] and 48[7], Federal Rules of Civil Procedure, and thus violates Rule 83, *supra*, as quoted in note 1.

We conclude otherwise.

As to Rule 38(a), our discussion of the Seventh Amendment applies.

Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required.[8] The rule as promulgated thus provided means for obtaining a less cumbersome fact-finding body than was otherwise provided by law by allowing the parties in a civil trial, together to waive their individual rights to a jury of a certain size.[9] To read it to provide means for enlarging the jury, i.e., as an affirmative grant of a *right* to the parties to demand more than the law otherwise requires, is to stand it on its head.

Judge Devitt, Chief Judge of the United States District Court for the District of Minnesota, writing on the subject of the six-man jury in federal courts, states with reference to Rule 48:

"This rule was adopted before the *Williams*

> decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, [170 U.S. 343 (1898)], that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12 absent a stipulation is, in my view, not a proper post-*Williams* interpretation of the Rule." Devitt, *The* Six Man Jury in the Federal Court, 53 F.R.D. 273, 274 n. 1 (1971).

Such apparently is also the view of the many district courts which have now adopted rules similar to that of the Montana District Court.[10]

Writ denied.

FOOTNOTES

1. (Page 1) Rule 83 provides in part that:
   "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."
2. (Page 2) U.S. Const., amend. VII:
   "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
3. (Page 2) This section provides in part:
   "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as to common law and as declared by the Seventh Amendment to the Constitution."
4. (Page 2) *Cf. Byrne v. Matczak*, 254 F.2d 525, 528-29 (9th Cir.), *cert. denied*,358 U.S. 816 (1958), where the

court determined (though in response to a constitutional attack) that a district judge had discretion to order dispersal of the jury overnight despite the fact that "the allowance of a dispersal is contrary to the old common law." The court ruled that "fair new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional." 254 F.(2d) 529.

5. (Page 3) *Cf. Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 1941). (If under the predecessor of Sec. 2072 "the rules are to prescribe a single form of action for cases at law and suits in equity, the *constitutional right to jury trial inherent in the former* must be preserved.") (emphasis supplied).
6. (Page 3) Rule 38(a):

   "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."
7. (Page 3) Rule 48:

   "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."
8. (Page 3) See the discussion in *Williams v. Florida*, 399 U.S. 78, 90-92 (1970).

   We note that *Fox v. United States*, 417 F.2d 84, 89 (5th Cir. 1969), cited Rule 48 for the proposition that the verdict in federal civil trials must in the absence of stipulation be given by twelve jurors. This decision, however, was rendered prior to *Williams v. Florida*, discussed in text, and thus quite understandably saw Rule 48 as reflecting the then-established view that a party who did not choose to stipulate to a lesser number was entitled to trial by a jury of twelve.
9. (Page 3) Cf 5a *Moore's Federal Practice* 2152 (2d ed. 1971).
10. (Page 4) See, e.g., Devitt, *The Six Man Jury in the Federal Courts*, 53 F.R.D. 273, 277 n.5 (1971).

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 2nd day of May, 1972, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, by depositing full, true and correct copies thereof, in the United States mail, first class postage prepaid, addressed as follows:

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U.S. District Judge for Montana
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s/ Lloyd J. Skedd